APPENDIX A

Effects of the Commuter Practice

Extremely large numbers of Mexican nationals enter the United States as daily commuters. A count made by the Immigration and Naturalization Service on January 31, 1970, indicated that 50,202 daily commuters crossed the Mexican border to work in industrial and agricultural employment on that day alone. Immigration and Naturalization, Responses to the Senate Subcommittee on Migratory Labor, p. 3-1, in Hearings on Migrant and Seasonal Farmworkers Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2033 (1969). It is likely that between a third and a half of these commuters worked in agricultural employment even though this was not during the agricultural season.[1] If a similar survey were conducted during the harvest season, the number of commuters and the percentage employed as agricultural workers would be greatly increased. Commuters constitute at least 85 percent of the seasonal agricultural work force in Imperial and San Diego counties in California. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 126 (1968).

Studies made by the Department of Labor show that daily commuters have a serious impact on domestic labor.

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[1] An earlier survey made by the Immigration and Naturalization Service on January 17, 1966, found that 44,000 alien commuters crossed the border that day. Ninety-five percent came to eight border areas—El Paso, Laredo, Brownsville, and Eagle Pass, Texas; Nogales and San Luis, Arizona; Calexico and San Isidro, California. Over 17,000 of these commuters worked in agricultural employment. 116 Cong. Rec. 5957 (1970).

The commuter alien lives in Mexico where living standards and costs are much lower than in this country. Thus, he is able to accept, and does accept, less pay than American residents. The result is that wages are invariably lower and unemployment greater in border areas where commuters work than elsewhere. In both California and Texas, agricultural wages are lowest in border areas and highest in areas farthest removed from the border. *Id.* at 116, 127. Unemployment in Texas border towns is 95 percent higher than in areas in the interior and in California unemployment in the Imperial Valley is twice the state's average. *Id.* at 128. "The fact that unemployment is heavy and wage rates are low in the border towns is not coincidental. Workers residing in Mexico contribute to the labor surplus by filling jobs that United States residents would otherwise have and frequently take them at wage rates unacceptable to United States residents." *Id.* at 123; see North, "The Border Crossers: People Who Live in Mexico and Work in the United States," prepared for the Manpower Administration, Department of Labor; p. 143 (April 1970). The Labor Department has found that the commuter alien further reduces the real income of United States residents by sharing in the enjoyment but not the costs of many public services in the United States such as public highways, police protection services, shopping facilities, schools, health, welfare, manpower and poverty programs. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 113; North, "Border Crossers," *supra*, pp. 185-186, 192, 196.

Most of the data concerning the commuter practice concerns daily commuters and the border areas where they work. This results from the difficulty in identifying the seasonal commuter under the Immigration Service's

methods of administering the commuter program on the Mexican border. As a result, there are widely inconsistent figures even on the number of seasonal commuters who enter the United States. On the one hand, it has been estimated that from 100,000 to 400,000 work in the fields in the United States each year. 116 Cong. Rec. 5954 (1970). On the other hand, defendants stated in the district court that they have counted just over 6,000 seasonal commuters (Memorandum of Points and Authorities, p. 2) and now state that there are 8,300 seasonal commuters (Gov. Br. 64). Charles Gordon, the General Counsel of the Immigration and Naturalization Service, refers to "a large influx of seasonal workers." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 183 (1969).

There is no doubt, however, that the seasonal commuter contributes to low wages and working conditions. Like the daily commuter, he can work for lower wages because he spends much of the year living as part of the low-cost economy of Mexico. Fineberg, "Green Card Labor and the Delano Grape Strike: A Study of Post-Bracero Mexican National Farm Workers in the San Joaquin Valley" in Hearings on Employment of "Green Card" Aliens During Labor Disputes, *supra*, p. 13.

The admission of both daily and seasonal commuters also discourages unionization. Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 1951, 2531, 2543 (1969). The Farm Workers Organizing Committee has sought to organize farm labor into a strong union capable of representing the now largely unrepresented

interests of farm workers. Its efforts have been jeopardized by the large numbers of commuter aliens who are ready to take the place of union members on strike. Commuters themselves are difficult to organize because they can survive in the lower-cost Mexican economy on wages which are unacceptable to American workers. Fineberg, *supra*, p. 13.

The Labor Department, which conducted a study of the Delano, California, labor dispute concerning grape workers, concluded that seasonal commuters are being employed there as strike breakers. 116 Cong. Rec. 5964 (1970). The Immigration Service itself has admitted that the seasonal commuter is even more of a threat to domestic agricultural labor than the traditional daily commuter. James Hennessy, Executive Assistant to the Commissioner of the Immigration and Naturalization Service, testified at a Senate hearing that it is the seasonal commuter who is the chief impediment to unionization of agricultural labor in California (Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 52 (1967):

> [T]hose [seasonal workers] who come in late March or April and have gone along with the harvesting of the crop across the Southwest and up North. It probably is there that you are going to find the commuters who are causing the unions so much trouble in California today.

APPENDIX B

History of the Commuter Practice

Prior to 1921, Mexican nationals freely entered the United States to work. Although the Immigration and Nationality Act of 1917 prohibited the admission of alien contract labor to the United States, an exception was made for Mexican laborers. Act of February 5, 1917, Sec. 3, 39 Stat. 875. Their entry was further facilitated by Section 23 of the Act which directed the Commissioner of Immigration not to delay ordinary travel across our borders. 39 Stat. 892. Ease of entry at our Southern border, however, was dramatically ended by the temporary Immigration Act of 1921.

The 1921 Act placed numerical limitations on immigration to the United States for the first time. The numerical limitations, however, did not apply to persons born in the Western Hemisphere and to aliens who had been in Western Hemisphere countries such as Canada or Mexico for at least one year prior to immigration to the United States (Act of May 19, 1921, 42 Stat. 5, Sec. 2(a)(7)), a period later raised to five years in 1922 (Act of May 11, 1922, 42 Stat. 540, Sec. 2). The temporary legislation of 1921 was replaced by the Immigration Act of 1924 which set up a permanent system of quota allocation and control. Act of May 26, 1924, 43 Stat. 153. While the 1924 Act, like the 1921 Act, did not impose quota limitations on residents of Western Hemisphere countries, Mexican nationals were required to acquire and present entry documentation in order to cross into the United States and the border patrol was established primarily to prevent illegal entry of Mexican nationals. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special series No. 11, p. 27 (1963).

The Immigration Act of 1924 created two categories of entering aliens, immigrants and non-immigrants. Immigrants were defined as all entering aliens with the exception of certain specified entrants who were designated as non-immigrants. Among the designated non-immigrant classes were temporary visitors "for business or pleasure." Sec. 3, 43 Stat. 153. Immigration officials considered the daily commuter as a non-immigrant "temporary visitor for business" because of the temporary nature of his contact with the United States. Study of Population and Immigration Problems, *supra*, p. 178. See also Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges, and Issues," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 101 (1968).

Another innovation in the 1924 Act was to require all immigrant aliens, whether quota or nonquota, to obtain visas to enter the country. Sec. 13(a), 43 Stat. 161-162. If an immigrant alien wished to depart from the United States temporarily, he could apply for and obtain a reentry permit which he surrendered at the border upon his return. Sec. 10, 43 Stat. 158-159.

The 1924 Act did not require documents from nonimmigrants. Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States before the Senate Committee on Immigration, 70th Cong., 2d Sess. 42 (1929). Since the commuter alien was considered as a non-immigrant visitor for business, he was not required to possess entry documentation. The Immigration Service, however, under an old rule promulgated in 1917 which was republished without change in 1925 and 1927, issued a border crossing identification card to all United States citizens and aliens who frequently crossed the border in order to facilitate their entry.[1]

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[1] The Immigration Rules of March 1, 1927, provided (Rule 3, Subdivision Q, Para. 1):

[Footnote continued on page 100]

In April 1927, the Immigration and Naturalization Service reversed its position concerning daily commuters and declared that they were not "temporary visitors for business" but were immigrant aliens. General Order 86, April 1, 1927, p. 1. The primarily reason for the change was to prevent quota aliens from entering the United States through Canada and Mexico. Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States, *supra*, pp. 41-43. Many aliens from quota countries would come to Mexico or Canada and commute to work in the United States as non-immigrant visitors for business with a border crossing identification card. Under the new regulation, an alien laborer born in a quota country could not obtain the initial visa to enter the United States, while a Mexican or Canadian national could obtain an immigrant visa since no quota applied to those countries.

Once the Mexican or Canadian national who commuted to the United States was admitted, he was treated, as before, like a non-immigrant. Despite his new immigrant status, the Service did not require the daily commuter to take up residence in the United States. General Order 86, *supra*, p. 1-2. If he complied with the immigration laws, obtained a visa, and paid a head tax, he was "considered as having entered for permanent residence." *Ibid.*

The Immigration Service did not require daily commuters to have immigrant visas or reentry permits even

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[1] [Continued]

With a view to avoiding delays and embarrassment in cases of aliens and citizens, who residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress.

Cf. Immigration Rules of July 1, 1925, Rule 3, Subdivision R; Immigration Rules of May 1, 1917, Rule 12, Subdivision 9, and Rule 13, Subdivision 3.

though the 1924 Act required those documents of all immigrants. It would have been a practical impossibility for the commuter immigrant to obtain the required documentation for his daily trip across the border. Despite the clear provision of the 1924 Act, the Immigration Service decided that Congress simply could not have intended to end the commuter practice. Study of Population and Immigration Problems, *supra*, p. 178. See also *Report of the Select Commission on Western Hemisphere Immigration*, p. 101 (1968). The immigration authorities therefore continued to allow the daily commuter to enter the United States as an immigrant with the same border crossing card he had used as a non-immigrant visitor for business without regard to the 1924 Act. General Order 86, *supra*, p. 2. The Immigration Service simply republished the 1917 border crossing card regulation, this time authorizing its use for the commuter immigrant. Immigration Rules of January 1, 1930, Rule 3, Subdivision Q, Para. 1. Thus, by treating the commuter alien as an immigrant for his initial entry into the United States and a non-immigrant for his subsequent reentries, Immigration officials both managed to keep quota aliens out of the country and allowed daily commuters to enter freely.

Shortly after the Immigration Service's revision of the commuter status, two alien laborers from quota countries brought suit to obtain admission from Canada as non-immigrant temporary visitors for business. In upholding the Service's determination that daily commuters were immigrants, the Supreme Court decided that "business" must be interpreted strictly as "intercourse of a commercial character" because of a Congressional policy of restricting immigration in order to protect American labor (*Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231, 243, 244 (1929)):

> The various acts of Congress since 1916 evidence a progressive policy of restricting immigration. The

history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor.

* * * *

In view of the definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with workmen, whose protection it was one of the main purposes of the legislation to secure.

Both of the plaintiffs were quota aliens. As non-immigrant visitors for business, they could freely enter and leave the United States at will. Once they were reclassified as immigrants, however, they were required to apply for an immigrant visa and come within the quota set for their country. One of the plaintiffs was born in Italy. Under the then annual immigration quota of 100 for that country, he could not have gained entry as an immigrant without an extremely long wait. Thus, the Court's decision that temporary laborers were immigrants was consistent with the Congressional policy to protect American labor.

In 1952, the immigration, nationality and naturalization laws were revised and codified in the Immigration and Nationality Act of 1952. Immigration Act of June 27, 1952, 66 Stat. 163. One of the purposes of the new Act was to provide stronger protection for domestic American labor against competition with foreign labor. S. Rep. No. 1137, 82d Cong., 2d Sess. 11 (1952); H. Rep. No. 1365, 82d Cong., 2d Sess. 51-52 (1952).

The Immigration Act of 1952 added a new non-immigrant category which, on its face, appears to include both daily and seasonal commuters (Sec. 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H)):

An alien having a residence in a foreign country which he has no intention of abandoning * * * (ii)

> who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

Another important innovation in the 1952 Immigration Act was the labor certification process of Section 212(a)(14). 66 Stat. 183. That section provided that an immigrant could not enter the United States if the Secretary of Labor certified that there were sufficient domestic workers available for the work or his entry would have an adverse impact on the wages or working conditions of domestic workers.

The Immigration Act of 1952 also tightened the language of several pre-existing provisions of immigration law having at least some relation to the commuter practice. The definition of residence (Section 101(a)(33), 8 U.S.C. 1101(a)(33); the definition of nonquota immigrant (Section 101(a)(27), 8 U.S.C. 1101(a)(27)); the authorization of the border crossing identification card (Section 101(a)(6), 8 U.S.C. 1101(a)(6)); and the provision for waiver of the immigrant visa (Section 211(b), 8 U.S.C. 1181(b)), all were modified.

After the Immigration and Nationality Act of 1952, the Immigration Service eliminated its regulations adopted in 1930 which considered daily commuters as immigrants (Immigration Rules of January 1, 1930, Rule 3, Subdivision C, para. 1) and removed all mention of commuters from the regulations. Cf. 17 Fed. Reg. 11483 (Dec. 19, 1952), with 8 C.F.R. 110.6 (1947 Supp.). Nevertheless, despite the changes in the statutes and regulations, the Service continued to treat the daily commuter as an immigrant and permanent resident alien. The labor certification requirement of Section 212(a)(14) was applied to the commuter only upon his initial entry into the United States. *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 116 (D. D.C., 1960).

The Alien Registration Receipt Card (Form I-151), commonly known as a "green card," replaced the border crossing identification card as an entry document after the Immigration and Nationality Act of 1952 was passed. In 1957 the Immigration Service issued a regulation which stated that the use of the green card by immigrant aliens was restricted to those having an "unrelinquished lawful permanent residence in the United States." 22 Fed. Reg. 6377; 8 C.F.R. 221.1. Nevertheless, the Immigration Service continued to allow the daily commuter to use the green card as an entry document. Staff Report of the United States Commission on Civil Rights, "The Commuter on the United States-Mexico Border," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 163 (1969).

In the 1960's, Congress took several further actions to protect American workers from competition with foreign labor. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico had initiated the bracero program in 1943 to provide for the seasonal importation of Mexican agricultural workers. Act of August 4, 1942, 56 Stat. 1759. In 1949, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the agreement to protect domestic labor. Act of July 12, 1951, 65 Stat. 119. Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor.

During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero program increased markedly, reaching a peak of 450,000 in 1957. Despite the added safeguards to protect American labor, there was a growing concern in the country over the adverse impact of the program on domestic labor. Congress

therefore decided in 1964 to allow the program to lapse. In the future, seasonal Mexican farm labor was to enter the United States under the provisions of the Immigration and Nationality Act providing for temporary importation of unskilled labor as non-immigrants under Section 101(a)(15)(H)(ii), when domestic labor was certified as unavailable. 8 U.S.C. 1101(a)(15)(H)(ii). See *Report of the Select Commission on Western Hemisphere Immigration*, p. 93 (1968). However, the Immigration Service broadened the commuter status to include seasonal workers so as to allow ex-braceros to continue to enter the country as immigrants. Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 70, 73 (1969). Thus, the old bracero program has continued but without the provisions which formerly protected American domestic labor.

In 1965, Congress amended the Immigration and Nationality Act of 1952 to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965). The most important change was to strengthen the labor certification process. Section 212(a)(14) of the Immigration Act of 1952 had proved ineffective because an alien could only be excluded if the Secretary of Labor had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing who had applied to immigrate to the United States to take employment, or what their occupation, residence or employer would be. Review of the Operation of the Immigration and Nationality Act as Amended by the Act of October 3, 1965, Hearings before Subcommittee No. 1 of the House Com-

mittee on the Judiciary, 90th Cong., 2d Sess. 111-112 (1968).

The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States *unless* the Secretary of Labor has certified that there are not sufficient domestic workers to perform such labor and that his employment would not adversely affect the wages of American laborers similarly employed. Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14); H. Rep. No. 745, *supra*, p. 14; S. Rep. No. 748, *supra*, p. 15.

The 1965 amendments also changed the language of Section 211(b) which describes the category of persons to whom the Attorney General could give special permission to enter the United States without visas or reentry permits. The Immigration Service had allowed commuters to enter the United States with green cards under the 1952 Act pursuant to this Section. Under the 1965 amendments, the language was changed to allow only "returning resident aliens" to enter without immigrant visas or reentry permits. Section 211(b), 8 U.S.C. 1181(b). Nevertheless, the Immigration Service continued to allow daily and seasonal commuters to enter the United States as immigrants without immigrant visas.

In 1965, influenced by the adverse impact on the American economy and American workers of unlimited immigration from countries of the Western Hemisphere, Congress for the first time placed a quota on immigration from the Western Hemisphere, including Mexico, to take effect in 1968. Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921. The Senate Committee stated that it had "become increasingly concerned with the unregulated flow of immigration from the nonquota countries * * *." S. Rep. No. 748, 89th Cong., 1st Sess. 16 (1965). The amend-

ment was designed to stem the unrestricted flow of immigration from the Western Hemisphere and to give immigrants from the Western Hemisphere an equivalent status with aliens from other parts of the world. *Id.* at 17-18. As a result, new commuters entering as immigrants today not only injure domestic labor but also reduce the number of scarce immigrant slots available for bona fide immigrants desiring to become residents and citizens of this country. Testimony of Richard M. Scammon, former Chairman of Select Commission on Western Hemisphere Immigration, in Hearings on Employment of "Green Card" Aliens During Labor Disputes, *supra*, p. 94.